

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

RICHARD F. STOKES  
JUDGE

SUSSEX COUNTY COURTHOUSE  
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RE: ***Lester R. Shaffer, Shawn Brittingham, & Christopher Story v. William Topping, Ralph W. Holm, Jr. and Town of Georgetown***  
C.A. No. S11C-01-004 RFS

Submitted: June 21, 2012

Decided: August 24, 2012

Upon Defendants' Motion to Dismiss First Amended Complaint.  
Granted in Part. Denied in Part.

Dear Counsel:

Plaintiff Lester R. Shaffer is dismissed from this case under the doctrine of *res judicata*. Shaffer filed a separate but similar action with this Court, which was dismissed in March 2011. In June 2012, the Court denied Shaffer's motion for relief from judgment. As Shaffer's attorney conceded at oral argument, the denial is an adjudication on the merits with prejudice. Count I of the motion to dismiss is granted.

As to the so-called Silence Order issued by Defendant Topping, the record is unclear as to the number of such orders and to whom the orders are addressed. It cannot be said that there is no set of circumstances under which Plaintiff could prevail. The motion to dismiss Counts II and III is denied.

Defendants move to dismiss the claim of violation of the Delaware Whistleblowers' Protection Act. Plaintiffs allege in Count IV that Councilwoman Sue Barlow is a supervisor for these purposes. Title 17 *Del. C.* § 1702 defines "supervisor" as "any individual to whom an employer has given the authority to direct and control the work performance of the affected employee or any individual who has the authority to take corrective action regarding the violation of a law, rule or regulation about which the employee complains."

While Councilwoman Barlow can raise issues with Town of Georgetown Town Council, she does not have authority to take corrective action over the Georgetown Police Department. Plaintiffs offer nothing to support the assertion that Barlow is their supervisor. As a matter of law, the Court finds that Councilwoman Barlow is not Plaintiffs' supervisor pursuant to the Whistleblowers' Protection Act. Defendants' motion to dismiss Count IV is granted.

Defendants move to dismiss Plaintiff Brittingham's allegation that Town of Georgetown breached the implied covenant of good faith and fair dealing by the alleged constructive discharge. The covenant limits at-will employment only in a few exceptions based on a public policy. *E.I. DuPont de Nemours and Company v. Pressman*, 679 A.2d 436,

441 (Del.Ch.1996). An employee seeking protection from firing under the covenant of good faith and fair dealing must assert “a public interest recognized by some legislative, administrative or judicial authority. . . .” *Id.* (quoting *Shearin v. E.F. Hutton Group, Inc.*, 652 A.2d 578, 587 (Del.Ch.1994)). Brittingham alleges First Amendment infringement, which without discussion can be said to meet the public policy requirement. Defendants’ motion to dismiss Count V is denied.

In sum, the Court finds as follows:

Motion to dismiss Count I as to Plaintiff Shaffer is **GRANTED**.

Motion to dismiss Counts II and III as to First Amendment violations is **DENIED**.

Motion to dismiss Count IV as violation of Delaware’s Whistleblowers’ Protection Act is **GRANTED**.

Motion to dismiss Count V as breach of the implied covenant of good faith and fair dealing is **DENIED**.

**IT IS SO ORDERED.**

Very truly yours,

*/s/ Richard F. Stokes*

Richard F. Stokes

Original to Prothonotary

